

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 15 1996

In the Matter of)	
)	
Amendment of Part 20 and 24 of)	
the Commission's Rules --)	WT Docket No. 96-59
Broadband PCS Competitive Bidding)	
and the Commercial Mobile Radio)	
Spectrum Cap)	
)	
Amendment of the Commission's)	GN Docket No. 90-314
Cellular PCS Cross-Ownership Rule)	

To: The Commission

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COMMENTS OF AMERICAN WOMEN IN RADIO AND TELEVISION

American Women in Radio and Television ("AWRT"), by its attorneys, herein submits comments in the above-captioned Notice of Proposed Rulemaking ("Notice"), released March 20, 1996. In the Notice, the Commission seeks comment on a variety of issues related to its Personal Communications Service ("PCS") competitive bidding and ownership rules for the D, E and F frequency blocks.¹ In particular, the Commission seeks comment on whether its gender-based competitive bidding rules for the F-block are supported by an adequate record to withstand possible judicial scrutiny. The Commission has expressed concern that the current record is insufficient to maintain its existing gender-based auction preferences and has tentatively concluded that in the absence of such support, its rules should be modified to make

¹Notice at ¶1.

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F-block bidding gender neutral.² AWRP believes the Commission's concern is misplaced. As discussed below, not only is the Commission's record sufficient to justify the retention of its gender-based competitive bidding rules for the upcoming F-block auction, but such rules must be maintained in order for the Commission to fulfill its statutory obligations.

INTRODUCTION

AWRP is a non-profit, national organization of professional women and men who work in radio, television, cable, broadcast advertising, and other communications related fields. Since 1951, AWRP has worked to improve the quality of radio and television, to facilitate the exchange of ideas in the broadcasting and communications industries, and to promote the entry and advancement of women in broadcast and cable management and ownership and other communications fields.

In light of its extensive experience with the problems and discrimination historically encountered by women in communications industries, AWRP is in a unique position to present the views of women affected by the Notice. AWRP has been an active participant in related proceedings³ and welcomes this

²Id.

³See Comments of AWRP filed November 9, 1993, in response to the Commission's *Notice of Proposed Rulemaking*, PP Docket No. 93-253, Implementation of Section 309(j) of the Communications Act ("AWRP Comments in PP Docket No. 93-253"). See also Letter dated June 1, 1994 from AWRP to The Honorable Kweisi Mfume, Chairman, Subcommittee on Minority Enterprises, Finance and Urban Development, U.S. House of Representatives (providing

opportunity to address the gender-based issues raised by the Commission in the Notice.

DISCUSSION

A. The Commission Is Under A Statutory Obligation To Provide Meaningful Opportunities For Businesses Owned By Women To Participate In Auctions For Spectrum Based Services

In authorizing competitive bidding to award licenses for spectrum based services, Congress directed the Commission to ensure that certain "designated entities," including women, have the opportunity to participate in the provision of such services.⁴ In establishing rules to achieve this objective, Congress stated that the Commission shall:

promot[e] economic opportunity and competition ... by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.⁵

In response to this statutory directive, the Commission adopted competitive bidding rules for PCS designed to provide meaningful opportunities for women and women owned entities to participate in the auction and obtain licensees.⁶ Specifically, the

supplemental information to document the discriminatory barriers that women face in the telecommunications industry following a hearing held on this issue by the subcommittee on May 20, 1994).

⁴See 47 U.S.C. §309(j)(4)(D).

⁵47 U.S.C. §309(j)(3)(B). (emphasis added.)

⁶See In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Report and Order, PP Docket No. 93-252, 9 FCC Rcd 5532 (1994) ("Competitive Bidding Fifth Report and Order") at ¶2 ("We also adopt in the Order provisions to fulfill Congress's mandate that we ensure

Commission designated the C and F-blocks as "entrepreneurs' blocks" for which eligibility is limited to individuals and entities under a certain financial size. Recognizing that merely reserving blocks C and F for bidding by small companies would not, in and of itself, be sufficient to ensure that women and minorities would have an opportunity to obtain PCS licenses, the Commission also adopted certain provisions applicable only to businesses owned by women and minorities to assist these entities in attracting the capital necessary to be competitive in the bidding process.⁷

B. The Supreme Court's Decision In Adarand Did Not Change The Standard Of Review With Respect To Gender-Based Preferences

As a result of the U.S. Supreme Court's decision in Adarand Constructors, Inc. v. Pena,⁸ released just days before the filing deadline to participate in the C-block auction, the Commission postponed the auction in order to reevaluate its race and gender-based preferences.⁹ The Commission first determined that the

that ... businesses owned by minorities and women are given the opportunity to participate in the provision of broadband PCS. These rules will provide unprecedented opportunities for these designated entities to become meaningfully involved in the provision of a new telecommunications service.").

⁷Id. at ¶13. These measures include, *inter alia*, the use of bidding credits, installment payments, and reduced upfront payments. Id. at ¶¶14-18.

⁸115 S.Ct. 2097 (1995).

⁹See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Sixth Report and Order, PP Docket 93-253, 60 FR 37786 (July 21, 1995) ("Competitive Bidding Sixth Report and Order") at ¶4.

Court's holding in Adarand, i.e., that "all racial classifications ... must be analyzed by a reviewing court under strict scrutiny,"¹⁰ created legal uncertainties as to the validity of both the race and gender based preferences it intended to employ.¹¹

The Commission also expressed concern "that our present record would not adequately support the race- and gender-based provisions in our C block competitive bidding rules under a strict scrutiny standard of review" and that any attempt to supplement the record, or to conduct the auction with the rules as they existed and face certain litigation, would result in a lengthy delay before license grants would become final.¹² Due in large part to the Commission's belief that delaying the C-block auction would destroy the ability of the C-block licensees to effectively compete in the commercial mobile radio service marketplace, the Commission simply stripped the race and gender-based preferences from its rules and proceeded to auction.¹³

AWRT contends that the Commission should not impose the same result in this proceeding with respect to gender-based preferences. As the Commission has acknowledged, Adarand's strict scrutiny standard was adopted in the context of race-based preferences, and "[a]n intermediate scrutiny standard of review

¹⁰Adarand, 115 S.Ct at 2113.

¹¹*Competitive Bidding Sixth Report and Order* at ¶1.

¹²Id. at ¶11.

¹³Id. at ¶6.

currently applies to gender-based measures."¹⁴ Nevertheless, the Commission states that "the Court's refusal in Adarand to apply a less strict standard to benign race-based classifications than that applied to 'invidious' race-based classifications suggests that the same standard should be applied to benign and invidious gender-based classifications."¹⁵

AWRT respectfully submits that it is inappropriate for the Commission to modify its F-block auction rules based on the mere speculation that a reviewing court "might" overturn previous decisions applying intermediate scrutiny to gender-based preferences "if" presented with a such a question. While the path of least resistance would lead the Commission to eliminate both race and gender-based preferences as was done for purposes of the C-block auction, AWRT believes that the Commission must evaluate its gender-based preferences in accordance with the prevailing standard, namely, intermediate level scrutiny. In short, the Commission cannot ignore its clear statutory obligations pursuant to Section 309(j) for the sake of expediency.

¹⁴Notice at ¶18. In the rush to commence the C-block auction, this point was seemingly overlooked. Referring to both race and gender-based provision, the Commission stated that "we tentatively conclude that additional evidence may be necessary to meet the strict scrutiny standard of review required by Adarand." *Competitive Bidding Sixth Report and Order* at ¶6.

¹⁵Notice at ¶18.

C. The Record Established In The Competitive Bidding Fifth Report and Order Supports Retaining Gender-Based Preferences Under An Intermediate Scrutiny Standard

Despite stating that "our current record concerning adoption of the race- and gender-based measures contained in our C block auction rules is strong,"¹⁶ the Commission now believes that the "record in support of our gender-based preferences may be insufficient to satisfy intermediate scrutiny."¹⁷ AWRT strongly disagrees.¹⁸ Under the intermediate scrutiny standard applicable to gender-based measures, a provision is constitutional if it serves an important governmental objective and is substantially related to achievement of that objective.¹⁹ The Commission's gender-based auction provisions are designed to increase the access to capital for women and women owned businesses, and the record demonstrates that these rules are substantially related to achieving the important governmental interest of promoting

¹⁶See *Competitive Bidding Sixth Report and Order* at ¶6.

¹⁷Notice at ¶23.

¹⁸AWRT notes that it has repeatedly urged the Commission to conduct a study to further document the discrimination faced by women in communications. Unfortunately, despite expressing strong interest in such a project, AWRT understands that budget constraints have precluded the Commission from undertaking such an inquiry. While AWRT still believes that the Commission would obtain valuable information from such a study, as discussed herein, the present record is sufficient to retain the current gender-based preferences for the F-block auction.

¹⁹See Notice at ¶18 (citing Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1579-80 (11th Cir. 1994); Contractors Association v. City of Philadelphia, 6 F.3d 990, 1009-10 (3d Cir. 1993); Lamprecht v. FCC, 958 F.2d 382, 391 (D.C. Cir. 1992); Coral Construction Co. v. King County, 941 F.2d 910, 930-31 (9th Cir. 1991) cert. denied, 502 U.S. 1033 (1992)).

economic opportunity for women.²⁰ As such, the intermediate level scrutiny test, under which gender-based preferences must be evaluated, has been satisfied.²¹ The Commission should therefore retain its gender-based preferences for the F-block auction.

In establishing gender-based preferences, the Commission held that:

[I]t is necessary to do more to ensure that businesses owned by ... women have a meaningful opportunity to participate [in the PCS auction. Accordingly,] special provisions are tailored to address the major problems facing ... women desiring to offer PCS -- lack of access to capital.²²

The record upon which this conclusion was based is sound. For

²⁰As AWRT made clear in its Comments in PP Docket No. 93-253 at 7, promoting economic opportunity for women is unquestionably an "important governmental interest." This is best evidenced by the Supreme Court's holding that "[r]eduction in the disparity on economic condition between men and women caused by the long history of discrimination against women has been recognized as ... an important governmental objective." Califano v. Webster, 430 U.S. 313, 317 (1977); See also, Associated General Contractors v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987 (remedying disadvantages women faced in the market place is an important governmental interest); Coral Construction Co. v. King County, 941 F.2d 910, 932 (9th cir. 1991) (The county "has a legitimate and important interest in remedying the many disadvantages that confront women business owners.").

²¹Additionally, in eliminating the preferences on the eve of the filing deadline for the C-block auction, the Commission stated that "we recognize that many of the C-block applicants have already attracted capital and formed business relationships in anticipation of the C block auction." *Competitive Bidding Sixth Report and Order* at ¶8. The same cannot be said with respect to the F-block auction. Ever since the Adarand decision, the status of the Commission's race and gender-based preferences have been in limbo. This uncertainty has made it difficult for these potential designated entity applicants to attract the capital needed to effectively participate in F-block auction.

²²*Competitive Bidding Fifth Report and Order* at ¶96.

example, to support the proposition that the inability to access capital is a major impediment to the successful participation of women in broadband PCS, the Commission noted that in enacting the Women's Business Ownership Act in 1988, Congress made findings that women, as a group, are subject to discrimination that adversely affects their ability to raise or secure capital.²³ In addition, the Commission cited to evidence presented by AWRT that this problem still exists.²⁴ Additional support in the record includes reports from the National Women's Business Council and the National Foundation for Women Business Owners.²⁵

In sum, the gender-based preferences adopted by the Commission to fulfill its statutory obligations under Section 309(j) of the Communications Act will increase the ability of female-owned businesses to obtain PCS licenses by compensating for the historical and ongoing discrimination with respect to access to financing. Thus, the Commission's gender-based preferences are substantially related to achieving the important governmental goal of creating economic opportunity for women-owned businesses.

²³Id. at ¶101.

²⁴"While venture capital is an important source of funding for telecommunications companies, women owned companies received only approximately one percent of the \$3 billion invested by institutional venture capitalist in 1993." Id.

²⁵Id. at ¶¶ 101-102 (finding, respectively, that even successful women-owned companies did not overcome financing obstacles after they had reached a level of funding and profitability adequate for most other businesses, and that removal of financial barriers would encourage stronger growth among women-owned businesses, resulting in much greater growth throughout the economy.).

CONCLUSION

The Commission claims that it is "committed to fulfilling the mandate of 309(j) to ensure that women [owned] ... businesses have opportunities to participate in the provision of spectrum-based services."²⁶ For the reasons discussed above, AWRT urges the Commission to make good on this commitment and retain the gender-based preferences for the F-block auction.

Respectfully submitted,

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²⁶Notice at ¶6.